APPEAL NO. 033128-s
FILED JANUARY 28, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 7, 2003. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) impairment rating (IR) is 5%, as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission). In his appeal, the claimant argues that the amended report of the designated doctor should be given presumptive weight and that, therefore, his IR is 15%. In its response, the respondent (carrier) contends that the hearing officer correctly determined that the designated doctor should not have considered the claimant's medical condition after the examination date of December 2, 2002, and urges affirmance of the 5% IR.

DECISION

Reversed and a new decision rendered that the claimant's IR is 15%.

The claimant attached documents to his appeal, some of which were not admitted into evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence, in that the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing or that its inclusion in the record would probably result in a different decision. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

The parties stipulated that the claimant sustained a compensable cervical spine injury on _____, and that he reached maximum medical improvement (MMI) on December 2, 2002, the date the designated doctor examined the claimant. The designated doctor initially certified on December 2, 2002, that the claimant had a 5% IR using Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) pursuant to cervicothoracic Diagnosis-Related Estimate (DRE) Category II. The designated doctor noted that the claimant stated that he "did not experience or note any new complaints of numbness or tingling that was present after the reported injury of _____, that was not present prior to

the injury of _____,” and further noted that there was no atrophy of the neck. Two letters of clarification were subsequently sent to the designated doctor. In a response dated April 1, 2003, the designated doctor stated that he found no information in the correspondence from Dr. O, the claimant’s treating doctor, that would warrant any alteration of his report. In a June 9, 2003, response to the second letter of clarification, the designated doctor stated that prior to his evaluation of December 2, 2002, there was no available documentation that would justify use of cervicothoracic DRE category III. He acknowledged that he reviewed the report of electrodiagnostic studies forwarded to him dated May 21, 2003, performed by Dr. O, but stated the results of the study could not be considered valid because of the absence of documentation of the surface temperature of the tested areas at the time of the study. The designated doctor further noted that the study was performed five months after his evaluation of December 2, 2002. On October 9, 2003, upon receipt of documentation that when the electrodiagnostic studies were performed on May 21, 2003, the surface of the tested extremities was documented to be at least 32° Celsius, the designated doctor amended his report and certified an IR of 15% pursuant to cervicothoracic DRE Category III.

The hearing officer determined that the claimant’s IR was 5% in accordance with the designated doctor’s initial report. In so doing, she relied on Commission Advisory 2003-10, which was issued on July 22, 2003, and more particularly, the portion of the Advisory that states “[i]n the Texas workers’ compensation system, the injured employee’s [IR] is based on the employee’s condition on the date of [MMI] or the date of statutory [MMI], whichever is earlier.” In her discussion the hearing officer stated “[t]herefore the advisory requires the IR to be based upon the claimant’s condition on the date of MMI as determined by clinical objective findings and existing imaging and electrodiagnostic testing, not something produced five months later. The evidence did not establish that a condition (radiculopathy) existed on December 2, 2002.” The hearing officer is over reading the Advisory. By its title, it is apparent that the Advisory is providing guidance on the interpretation of several portions of the fourth edition of the AMA Guides. It is in this context that the quoted language discussing MMI must be considered. In our view, that provision was not meant to specifically define the relationship between MMI and IR. Rather, it was intended to clarify any confusion that may have been created by some language in the AMA Guides tending to indicate that the IR is to be assigned at the time of diagnosis. The purpose of the quoted language is to establish that IR is to be assigned when the impairment is permanent.

If the advisory were interpreted as the hearing officer interpreted it, it would be in direct conflict with Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), which provides that a designated doctor’s response to a request for clarification “is considered to have presumptive weight as it is part of the doctor’s opinion.” The decision to give presumptive weight to a designated doctor’s amended report is consistent with the principle that an injured worker should be compensated for all of the permanent impairment that results from the compensable injury. When Rule 130.6(i) was passed, the Commission’s practice of seeking clarification from the designated doctor by submitting additional medical records and diagnostic testing created after MMI was well established. Had the Commission intended to substantially

modify that practice, it would have done so by amending or repealing Rule 130.6(i), not by issuing an advisory that is identified as providing input from the Commission's medical advisor to health care providers. In this instance, the designated doctor amended his report and assigned a 15% IR in response to a Commission request for clarification, after he was convinced that the claimant's condition warranted a rating for radiculopathy under cervicothoracic DRE Category III. Under Rule 130.6(i) his amendment in that regard is entitled to presumptive weight and the hearing officer erred in not affording presumptive weight to the amended report and the 15% IR. The hearing officer's decision not to give the amended report presumptive weight renders the Commission's decision to seek clarification in this instance meaningless and is not in keeping with Rule 130.6(i).

The hearing officer's determination that the claimant's IR is 5% is reversed and a new decision rendered that the IR is 15% in accordance with the amended report of the designated doctor.

The true corporate name of the insurance carrier is **(a self-insured governmental entity through the Texas Association of Counties Workers' Compensation Self-Insurance Fund)** and the name and address of its registered agent for service of process is

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Edward Vilano
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would affirm the hearing officer's decision.

This is part of what the hearing officer wrote in her decision:

Subsequent to the filing of Texas Workers' Compensation Commission Appeal No. 030091-s, decided, March 5, 2003] Commission Advisory 2003-10 was released on July 22, 2003 which, under Section 4 states that the injured employee's IR is based on the employee's condition on the date of MMI or the date of statutory MMI whichever is earlier. On November 3, 2003 the [Appeals Panel filed Texas Workers' Compensation Commission Appeal No. 032402-s, decided November 3, 2003] upholding a hearing officer's use of Advisory 2003-10(3) to determine the proper IR. In Ins. Co. of PA v. Stelhik, 995 S.W. 2d 939 (Tex. App.-Fort Worth 1999) the court held that the interpretation of a regulation by the agency charged with its enforcement would be entitled to weight. In Stelhik, the court gave weight to a TWCC executive director's memorandum interpreting a statute because it found the memorandum to be reasonable and that it did not contradict the plain language of the statute.

Section (4) of 2003-10 does not appear to contradict any Rule or the Act. Rule 130.1(c)(3) provides that the assignment of an [IR] for the current compensable injury must be based on the employee's medical record and the certifying examination. It does not regulate when the IR is to occur. The MMI date in the present case was not extended due to surgery and was stipulated by the parties as December 2, 2002. Therefore the advisory requires the IR to be based upon the claimant's condition on the date of MMI as determined by clinical objective findings and existing imaging and electrodiagnostic testing, not something produced five months later. The evidence did not establish that a condition (radiculopathy) existed on December 2, 2002.

The May 21, 2003 EMG studies were not corroborated by any loss of reflexes. The Appeals Panel wrote in [Appeal No. 030091-s] that the AMA Guides do not state that electrodiagnostic studies showing nerve root irritation, without any loss of reflexes or atrophy, constitutes undeniable evidence of radiculopathy.

Based upon the foregoing, [the designated doctor's] report of December 2, 2002 is entitled to presumptive weight which assigns the claimant a 5% [IR].

The hearing officer's relevant findings of facts are as follows:

4. By TWCC-69 report of December 2, 2002, [the designated doctor] assigned the claimant a 5% IR by placing him in DRE category II based upon his clinical examination on that date and the claimant's existing medical records.

5. The claimant did not have cervical radiculopathy on December 2, 2002.

6. [The designated doctor] is the Commission selected designated doctor.

7. [The designated doctor] amended his report to place the claimant in DRE category III and assigned the claimant a 15% IR based upon electrodiagnostic testing performed five months after the date of MMI.

8. The TWCC-69 report from [the designated doctor] dated December 2, 2002 is entitled to presumptive weight.

9. The great weight of the other medical evidence is not contrary to [the designated doctor's] report of December 2, 2002 assigning the claimant a 5% IR.

This is what Section 408.123(a) states in part:

(a) After an employee has been certified by a doctor as having reached [MMI], the certifying doctor shall evaluate the condition of the employee and assign an [IR] using the [IR] guidelines described by Section 408.124.

This is what TWCC Advisory 2003-10 says regarding MMI and IR:

4. In the Texas workers' compensation system, the injured employee's [IR] is based on the employee's condition on the date of [MMI] or the date of statutory MMI, whichever is earlier.

This is what the Texas Supreme Court said in Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995) regarding MMI and IR:

> Moreover, in those rare situations where the claimant's condition has not stabilized after two years, the presumption will almost always benefit the claimant by inflating the [IR]. If the claimant is still recovering after two years, **the [IR], which is determined at [MMI]**, will be higher than the actual degree of permanent impairment. (Bold emphasis supplied).

This is what subsection (g) of Rule 130.6 entitled "Designated Doctor Examination for [MMI] and/or [IRs]" provides:

> (g) For testing other than that listed in subsection (f) of this section, the designated doctor may perform additional testing or refer employees to other health care providers when deemed necessary to assess an [IR]. Any additional testing required for the evaluation and rating, is not subject to preauthorization requirements in accordance with the Texas Labor Code, § 413.014 (relating to Preauthorization) and additional testing must be completed within

> seven days of the designated doctor's physical examination of the employee. Use of another health care provider to perform testing under this subsection can extend the amount of time the designated doctor has to file the report by seven working days.

Rule 130.6(i) provides, in part, as follows:

> (i) The designated doctor shall respond to any commission requests for clarification not later than the fifth working day after the date on which the doctor receives the commission's request. The doctor's response is considered to have presumptive weight as it is part of the doctor's opinion.

This is what the AMA Guides 4th edition says under the *Description and Verification* section of DRE Cervicothoracic Category III: Radiculopathy:

> *Description and Verification:* The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, and 4, Table 71, p. 109).

With all due respect to the Appeals Panel judges who agree with the majority opinion, given the applicable law and what facts of the case, I do not believe that the majority opinion has provided a legitimate basis for overturning the hearing officer's decision. And while I do not wish to upset any Appeals Panel judge, it does appear that the basis for the majority decision, that is "The hearing officer is over reading the Advisory," might be read by some to be a somewhat contrived basis for reversing the hearing officer's decision. The language in the Advisory is straightforward and is consistent with what the Texas Supreme Court said in the Garcia case regarding determining the IR at MMI. Nowhere does the majority opinion find that the great weight of the evidence is contrary to the hearing officer's decision. The majority opinion simply applies Rule 130.6(i) in isolation and in disregard of the hearing officer's findings. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). This is not a case where the designated doctor has been appointed several months, or even years, after the claimant has reached MMI, thus making it extremely difficult, if not impossible, to relate the designated doctor's findings on physical examination back to the date of MMI. When the designated doctor is appointed long after a claimant has reached MMI, or when the Commission sends to the designated doctor medical reports written after the designated doctor's examination or diagnostic tests performed after the designated doctor's examination requesting review of such reports for the purported reason of seeking "clarification," there will be difficulty in determining the IR in relation to the MMI date. Since this is a continuing dilemma, each case will have to be decided upon its own facts. In this case, the designated doctor

examined the claimant on the date of MMI. I would affirm the hearing officer's decision as I see no legitimate basis for reversal.

_____
Robert W. Potts
Appeals Judge